JD(SF)–13–06
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ATC, LLC d/b/a ATC OF NEVADA

and

Cases 28-CA-20076
28-CA-20197

AMALGAMATED TRANSIT UNION,
LOCAL 1637, AFL-CIO, CLC

Nathan W. Albright, Esq., for the General Counsel.

Richard D. Prochazka, Esq.,
(Richard D. Prochazka & Associates, APC)
of San Diego, California, for the Charging Party.

James N. Foster, Jr., and *Daniel G. Fritz, Esqs.*
(McMahon, Berger, Hanna, Linihan,
Cody & McCarthy) of St. Louis, Missouri,
for Respondent.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on November 7-9, 2005. The charge, first amended charge, and second amended charge in case 28-CA-20076 were filed by the Amalgamated Transit Union, Local 1637, AFL-CIO, CLC (the Union) on December 21, 2004[1], January 3 and February 23, respectively; the charge and first amended charge in case 28-20197 were filed by the Union on March 15 and April 27, respectively. The order consolidating cases, consolidated complaint and notice of hearing (the complaint) was issued April 29. The complaint alleges[2] that ATC, LLC d/b/a ATC of Nevada (Respondent) violated Section 8(a)(1) by threatening employees with discipline because they engaged in union activity and interrogating employees about their union activity when it required them to complete a questionnaire. The complaint alleges that Respondent violated Section 8(a)(2) by accepting, processing and adjusting a grievance filed by Transit Drivers Association of Nevada (TDAN), a labor organization. Finally, the complaint alleges that Respondent violated Section 8(a)(5) by failing to provide the Union with requested information and assigning unit work outside the unit, requiring unit employees "to call into work on their days off for assignment to overtime work," requiring unit employees "to call the Tompkins Yard and Simmons Yard on their days off for assignment to overtime work," eliminating certain bid routes, failing to follow the bidding process, and failing "to continue in effect all the terms and conditions

[1] All dates are in late 2004 and early 2005 unless otherwise indicated.

[2] The complaint originally had allegations arising from case 28-CA-20172. Those allegations and that charge were withdrawn from the complaint.

of the Agreement by putting into effect a Memorandum of Agreement," all without first obtaining the consent of the Union. Respondent filed a timely answer that, as modified at the hearing, denied the substantive allegations of the complaint but admitted the allegations concerning the filing and service of the charges, jurisdiction, the Union's labor organization and Section 9(a) status, agency, and appropriate unit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Union, I make the following.

Findings of Fact

I. Jurisdiction

Respondent, a limited liability company, has been engaged in the operation of a local passenger transit system for the Las Vegas, Nevada metropolitan area. During the 12-month period ending December 21, 2004, Respondent derived gross revenues in excess of $250,000 and purchased and received at its Nevada facilities goods valued in excess of $50,000 directly from points outside the State of Nevada. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Although Respondent denied that TDAN is a labor organization the evidence shows that it is an organization in which employees participate and that exists for the purpose of representing employees in grievance handling and collective bargaining with employers. I conclude that TDAN is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent provides bus transportation services for the County of Clark; that includes the Las Vegas metropolitan area. It provides these services pursuant to a contract with the Regional Transportation Commission. Its primary location, known as the Simmons facility, covers about 40 acres and employs about 45 mechanics, 25 bus cleaners, over 500 coach operators and houses about 215 coaches and all the administrative staff. The second location, known as theTompkins facility, employs about 220-230 coach operators, about 18 mechanics, and some other service workers. The RTC owns the busses, develops the routes, and designs the schedules; Respondent provides the staffing to fulfill the objectives set by the RTC.

Respondent and the Union were parties to a contract effective October 1, 1996 through December 31, 2001. This was followed by a contract effective July 1, 2002 through June 30, 2006. Charles Kellogg is Respondent's human resources manager. J-nean-e Mills is a senior supervisor at the Tompkins facility. Richard Valero works as a full time coach operator for Respondent and since June 2004 has been the Union's president/business agent. William Beaty is the Union's vice president. Thomas Vukdelich also works as a full time coach operator for Respondent; he serves as an executive board member for the Union.

B. Transfer of Bargaining Unit Work Allegation

For years Respondent has found it difficult to hire enough coach operators to cover the routes specified by the RTC. It has requested operators to volunteer to work overtime and then required the operators to work overtime if volunteers were insufficient to meet its needs. On

Thanksgiving Day, 2004, 101 employees called off work; this was out of about a total of 350 shifts for that day. The next day about the same number of employees called off. In Respondent's view this was both unprecedented and suspicious. It resulted in chaos as Respondent tried to patch things together to deliver service to riders. After Thanksgiving, Respondent began calling its facilities in other states in preparation for having operators from those facilities come to work at its Nevada locations.

On December 13 Respondent sent the Union the following letter:

> We continue to experience a shortage of drivers and/or drivers willing to fill overtime runs. In addition, when we require overtime, drivers are finding means of becoming absent. As a result, we immediately need to cover these runs. We have, with the Union's knowledge and consent, used Supervisors and other properly licensed and experienced ATC employees, but remain reluctant to rely on this as a solution. Accordingly, unless we receive an objection from the Union within five days of this letter, it is our intention to use other drivers from other locations to cover during this shortage. Time is of the essence.

At the time this letter was sent Respondent had made specific arrangements for work to be done by nonunit workers, but these nonunit workers had not yet started working.

The next day the Union responded:

> We understand the unfortunate circumstances surrounding the present state of affairs at ATC regarding operator's filling runs. We wholeheartedly intend to participate in achieving a mutual and equitable solution to this problem.
>
> However, in response to your letter dated December 13, 2004 in regards to your intention to use Supervisor's and other properly licensed and experienced ATC employees as a means to cover these runs is unacceptable and a violation of our Collective Bargaining Agreement.
>
> Accordingly, we intend to file a grievance objecting to this solution as a means of facilitating the overtime need.

Starting in mid-December and continuing into January about 30 drivers from other facilities came to the Las Vegas area and worked as coach operators. During that same period of time supervisors also performed this unit work. They performed work that otherwise would not have been performed by unit employees because Respondent lacked sufficient drivers to operate the vehicles, especially in light of the call offs and the unit employees' unwillingness to work additional overtime. However, the out of state drivers were not paid pursuant to the contract between Respondent and the Union; instead they were paid pursuant to the collective-bargaining agreement that covered them at their home location.

On December 17, the Union filed a grievance over Respondent's:

> [A]nnounced intent to commence utilizing other than bargaining unit employees perform bargaining unit work.
>
> In response to your telephonic communication that the Company intended to start using supervisors to perform bargaining unit work and your letter of December 13, 2004 that the Company is intending to start using not only

> supervisors, but other properly licensed and experienced ATC employees, please be advised that Local 1637 has not and does not consent to any such proposal.

The grievance asserted that Respondent violated the following sections of the collective-bargaining agreement: section 1, participative work agreement, section 2.2, entire agreement, section 4, recognition, section 8.1, nondiscrimination, section 14, promotions, section 21, union/management committee, section 25, workweek and overtime, section 26, probationary period, section 28, part-time employees, section 30, wage progressions/incentive plans, section 31, bidding process, and section 32, extra-board. None of those sections, however, expressly forbid Respondent from using nonunit employees to perform unit work.

Analysis

As indicated, the complaint alleges that Respondent assigned unit work to nonunit employees without first obtaining the Union's consent in violation of Sections 8(d) and 8(a)(5). In order to prevail on this allegation the General Counsel must show that provisions contained in the existing collective-bargaining agreement were changed by Respondent. *Bath Iron Works Corp*., 345 NLRB No. 33 (2005), slip op. at 3-5. But here there is nothing in that contract that forbids Respondent from assigning unit work to nonunit employees.

The General Counsel's legal argument on this point goes as follows. He cites *St. Vincent's Hospital,* 320 NLRB 42 (1995) and cases cited therein for the propositions that an employer may not change working conditions contained in a contract without the union's agreement and that consensual oral agreements may become part of the contract. Without citing any provisions of the collective-bargaining agreement the General Counsel then states: "Under the principles set forth above, Respondent, by its actions, changed the provisions contained in the CBA." The General Counsel then argues that this occurred in late November even before Respondent's December 13 letter. The General Counsel concludes:

> The Unit description, admitted by Respondent, specifically excludes supervisors from the Unit. The unit description contained in the CBA applies only to Unit employees hired and working in Las Vegas. Kellogg conceded that the out-of-town drivers were paid according to the collective-bargaining agreement in their home local. On its face, Respondent's actions were a change in the Recognition clause of the CBA.[3] Even though Kellogg told the Union Respondent had a staffing problem, such an assertion is no defense to the implementation of a mandatory subject of bargaining without the consent of the Union. *St. Vincent Hospital,* supra. Respondent changed the provisions contained in the CBA and changed Unit employees' terms and conditions of employment without the consent of the Union, and, accordingly, violated Section 8(d) and (5) of the Act.

It seems that the General Counsel may be arguing that Respondent unlawfully failed to apply the contract's terms to the nonunit workers who performed the unit work. The difficulty

[3] The logic of this point escapes me. If supervisors are excluded from the unit and unit employees are only those working and hired in Las Vegas, then it follows that the supervisors and the workers from other facilities were not unit employees and therefore Respondent did *not* breach the recognition clause by failing to recognize the Union as the bargaining representative for these nonunit employees.

with this theory is that it is not the theory alleged in the complaint. Just the opposite, the complaint alleges that the assignment of unit work "to employees not in the Unit" was unlawful; it did not allege that Respondent failed to treat those workers as unit employees. There is a difference between employees performing unit work and employees being members of the unit. Nor was the matter fully litigated in that there is no evidence concerning whether those workers were unit employees or not. Under these circumstances I dismiss this allegation in the complaint.

C. Failing to Continue in Effect the Terms and Conditions of the Agreement Allegation

After previous discussions with the Union, on November 24 Kellogg presented Valero, Beaty, and Vukdelich with a proposal for a memorandum of understanding covering several matters. One provision dealt with fixed route mechanics and described a procedure whereby they could be eligible for hourly wage increases of up to 40 cents beyond those set forth in the collective-bargaining agreement provided the mechanics met certain safety standards. Another section described a procedure whereby full time fixed coach operators could receive up to 50-cents-per-hour above the wage rates in the collective-bargaining agreement provided the operator met certain safety and attendance standards; this provision also allowed Respondent to develop a program for probationary employees that would allow them to transition more smoothly into becoming full time fixed coach operators. Under another section service workers who clean certain specified vehicles would receive 40-cents-per-hour wage increase. Another section provided for a $400 bonus for employees who referred an applicant who was subsequently hired as a full time fixed coach operator. The collective-bargaining agreement provided for a $25 referral bonus. Finally, in an effort to increase recruitment and retention of operators, operators in training would receive an hourly wage increase of $1.50, in service operators 75 cents, and post-probationary operators 25 cents; the hourly wage rate for other operators would remain the same. The Union made several suggestions, mostly to increase the amount of wage increases to be given to the employees.

Respondent and the Union met again on December 8; this time the Union's entire seven person executive board was present and other managers also attended with Kellogg. Kellogg had incorporated some of the Union's suggestions from the last meeting and presented a revised proposal. As further modified during the course of the meeting the proposed memorandum of understanding provided as follows. The safety and attendance wage increase was increased from 50-cents-per-hour to $1 and the eligibility standards were loosened. The potential hourly wage increases for mechanics increased from 40 cent to 70 cents and for operators in training from $8.50 to $9 and service workers from 40 cents to 50 cents. The Union's executive board expressed unanimous support for Respondent's proposals. The parties reached tentative agreement and agreed that the agreement should be finalized in writing, reviewed and signed.

But a day or two later Valero called Kellogg and told him the Union could not just agree to the revised terms, that the members had to vote on it and the vote could not be held until December 22. Kellogg told Valero that was not the deal.

Respondent had prepared advertisements with the higher wage rates described in the December 8 meeting. On December 9 or 10 Kellogg asked Valero by telephone if he could move forward with the advertising and Valero agreed. Around this same time Valero advised Kellogg that he was going to put up notices to employees of the meetings concerning the proposals and he asked Kellogg to be sure that the notices were not taken down by supervisors. Later Valero and Kellogg had a series of conversations concerning when the mechanics would begin receiving their wage increases under the proposals and they were unable to reach an

agreement. Kellogg said that Respondent was going to implement the proposals with or without the Union's signature.

The Union members rejected the agreement on December 22 by a vote of 49 to 1. That night Valero faxed Kellogg the results. On December 23 Kellogg replied by letter asserting that,

> [T]he December 8, 2004 agreement was reached with unanimous support of the ATU Executive Board and the ATU originally advised ATC that no election process of its membership was necessary.
>
> It is the position of ATC that the ATU has not bargained in good faith. The agreement provides additional compensation for bargaining unit employees and again this agreement was fully reached in good faith. ATC intends to implement the five (5) economic proposals dated December 8, 2004, as originally agreed upon. Implementation of these proposals is in the best interest of ATC's valued employees.

Except for the provision allowing the development of a program for probationary employees that would allow them to transition more smoothly into becoming full time fixed coach operators, Respondent implemented the December 8 conditions and thereafter employees received the wage increases as provided. For example, Valero received the $1-per-hour-wage increase and received bonus money for referring an applicant who was then hired by Respondent.

Analysis

The foregoing facts are based on a composite of the credible testimony of Kellogg, Valero, and Vukdelich. The General Counsel and the Union contend that during the course of these meetings the Union stated that the memorandum of understanding would have to be approved by a vote of the membership before it could become effective. For reasons explained below I do not credit the testimony they rely on to support this assertion.

Vukdelich testified that at the November 24 meeting "Mr. Beaty was extremely vocal and extremely vehement, about the fact that no matter what, it would have to be voted on, by the membership." Valero testified concerning this meeting but made no reference to any comments by Beaty. Beaty did not testify at the hearing. Kellogg denied that anything was said about a membership vote. Vukdelich's testimony on this matter appears exaggerated at the least and Valero did not corroborate Vukdelich on this critical point. I do not credit Vukdelich's testimony on this point. Moving on to the December 8 meeting, according to Valero, the parties reached tentative agreement but Beaty said that the agreement had to be put to a vote by the membership; the statement attributed to Beaty, however, does not appear in the Valero's pretrial affidavit. Moreover, Valero testified that at some point he told Kellogg "that the Executive Board would vote on it, if there was – if we did – reach a quorum. Okay. In other words, if there was such gross apathy among the membership, then the Executive Board would vote on it but there was not. There was not – there were enough members to show up, to reach a quorum." Valero's uncertainty on this point is palpable and his statement is not consistent with the unequivocal statement he attributed to Beaty. Valero also testified that during a break at the December 8 meeting Kellogg asked him whether they had an agreement. Valero answered that they did not at that point; the Union had to "run it up the flagpole" and see how the proposal weighs with the membership. Kellogg supposedly replied by asking if they could get past this because Respondent needed to get people hired etc. Valero said he would do his best to expedite the matter. This is a third and somewhat different version of what the Union supposedly told Kellogg about the need for a membership vote. It strikes me as unlikely that

Kellogg would be preparing to place new advertisements in a day or two if the Union had clearly told him that the agreement had to be voted upon by the members and that the process would take several weeks. I take into account the fact that Valero was employed by Respondent at the time he testified. I also acknowledge that Kellogg did not specifically deny the substance of the individual conversations with Valero. Nonetheless, based on the foregoing and my observation of the demeanor of the witnesses, I do not credit Valero's testimony on this matter. Vukdelich testified that at this meeting Beaty said "again, very, very, surely and loudly let everybody know that it still had to be put, for a vote to the membership, and Mr. Beatty has been very strong on that right from the beginning." He testified that Kellogg replied that they hoped their proposal would work its way through and pass and the Union agreed. But such a response from Kellogg seems extremely unlikely under the circumstances. Remember Respondent was seeking to hire new operators and get the proposals in place before the Christmas holidays. This would not happen if the Union could not even advise Respondent that it had an agreement until weeks later. Vukdelich's testimony again appears exaggerated. I take into account the fact that Vukdelich was employed by Respondent at the time he testified. But based on the foregoing and considering the relative demeanor of the witnesses I do not credit Vukdelich's testimony on this matter. One last credibility matter must be addressed. Kellogg testified that on December 9 or 10 he asked Valero by telephone if he could move forward with the advertising and Valero agreed. On direct examination, Valero testified to a conversation where he advised Kellogg that he was going to put up notices to employees of the meetings concerning the proposals and that he asked Kellogg to be sure that the notices were not taken down by supervisors. After Kellogg testified as described above, Valero was recalled by the General Counsel on rebuttal and testified that during this same conversation Kellogg mentioned that he wanted the new ads to get out and he answered that they had the two meetings set up and that he was acting as quickly as he could and that Kellogg needed to do what he needed to do. When I asked Valero why he had not mentioned this portion of the conversation during his earlier testimony he stated that he forgot. This testimony supports my conclusion not to rely on Valero's testimony on this matter.

In sum, the credited facts show that the Union agreed to allow Respondent to grant wage increases to unit employees and that the only remaining matter was the formality of signing the agreement. Thereafter, the Union interjected the matter of membership approval and never signed the agreement. But the fact that the Union never signed the agreement does not detract from the fact that it agreed to allow Respondent to make the changes. Because Respondent in fact obtained the Union's consent to make the changes, it follows that this allegation must be dismissed.

D. Related Request for Information Allegation

As noted above, on December 17 the Union filed a grievance concerning Respondent's use of nonunit workers to perform unit work. That same day the Union sent Respondent a request for information for the week ending December 18 concerning what the request described as "Other than Bargaining Unit Employees Performing Bargaining Unit Work." The request consisted of eight pages and is attached in full to the complaint. Among other things, the Union wanted the name, address, and telephone number of persons who were not in the bargaining unit but who performed bargaining unit work, and the pay rate while performing unit work. It asked for the person's date of hire, work history, the dates and hours the employee performed unit work, the benefits extended to these employees and other information. Thereafter the Union made similar requests for information covering different periods of time.

On January 19 Respondent sent the Union a letter requesting that the Union provide in writing why the Union thought the requested information was relevant. The letter explained that

Respondent:

> [W]as forced to use other means to fill the vacant routes on this emergency basis due to the Employer's inability to staff enough regular full-time operators, the lack of volunteers to work overtime and the Employer's inability to hire enough part-time operators. It is crucial to point out that the Collective Bargaining Agreement does not prohibit the Employer from utilizing supervisors and/or other ATC employees when there is a shortage of full-time and part-time operators. Additionally, the Employer made the Union aware of this problem prior to the week of December 12, 2004 through December 18, 2004 when the Employer met with the Union and offered the Union a wage increase package, which would have allowed the Employer to attract and retain operators. However, the Union voted to reject the Employer's incentive offer, which resulted in the Employer being forced to seek additional emergency assistance. This was after you and the committee unanimously accepted the proposal.
>
> The Employer believes that using other ATC employees was appropriate. Even though the Union backed the Employer into a corner with their refusal to accept the wage increase, the Employer has continually employed every full and part-time operator in accordance with the Collective Bargaining Agreement. Moreover, the Employer only used other ATC employees after the Employer exhausted every possible option with the full and part-time operators. To the Employer's knowledge, no regular, full or part-time operator was denied any work during the week at issue. It is the Employer's assumption that the Union perceives the Employer's action of filling the vacant routes as appropriate. If the Employer had not filled the vacant routes, customers and patrons would have been left stranded at ATC bus stops without any means of transportation. It was clearly not our intent when we signed the Collective Bargaining Agreement to leave customers and patrons stranded. If it was our intent, we would never have included Sections 7.1 and 9.1 in the Collective Bargaining Agreement. Section 7.1 states, "They [Union members] shall at all times use their influence and best endeavors to preserve and protect the interest of the Company and cooperate in the promotion and advancement of the Company's interest." Section 9.1 in pertinent part states, "It is mutually desired by the Company and the Union to deliver uninterrupted public service to the Citizens of Clark County."
>
> If any of the Employer's assumptions are incorrect, please correct the Employer in your response. Also, if you still believe that a response remains necessary for any of the items that you requested in your December 17, 2004 letter, please indicate why each request is relevant, and the Employer will continue to collect and organize the data. As previous[ly] stated, the Employer does not perceive this request as relevant. The information request does not relate to bargaining unit employees, and the Employer perceives this information as confidential. Moreover, your requests are extremely vague. For example, are you assuming that supervisors are getting paid and compensated differently for the emergency assistance they are providing?
>
> Therefore, if you still desire to have the Employer respond to your information request, please provide the Employer a response indicating why you believe each request is: (1) relevant, (2) not confidential, (3) what specifically you are seeking and (4) for what time period.

The Union replied on January 19, 2005. It advised Respondent that it was the arbitrator and not Respondent who decides if the collective bargaining agreement is violated. It continued:

> Obviously, it is Local 1637's position that all bargaining unit work done must be done under the terms of the contract and if you utilize employees to perform this work they must be employed pursuant to the terms of the Collective Bargaining Agreement.
>
> While you assert that the Union rejected the Employer's offer after the committee had unanimously accepted the proposal, which is not factually correct. The committee told you that they would recommend the proposal but they were going to take it back to the membership. The committee in fact recommended the proposal and then the membership in fact rejected it.
>
> ….
>
> The purpose for requesting the information is to determine whether or not in fact the Employer is utilizing the terms of the Collective Bargaining Agreement to govern the employment of all people performing bargaining unit work.

The letter then provided a more detailed explanation of why the information was relevant and rejected the assertion that it was confidential.

Respondent did not provide the requested information to the Union.

Analysis

An employer must provide a union with requested information that is relevant and necessary for the union to carry out it duties as the exclusive collective bargaining representative of the unit employees. *NLRB v. Acme Die Casting Co.,* 385 U.S. 432 (1967).

Respondent correctly points out that where a union requests information concerning employees outside the bargaining unit that the union represents, the union must show that the information is relevant. Respondent argues that the Union here has failed to do so. It points to the January 19 letter, described above, where Respondent asked the Union to explain the relevance of the requested information and to the Union's response where, according to Respondent, "The Union, **without** an explanation, merely concluded its requests were relevant." (emphasis in original) I found no merit to this argument. Under the circumstances here, where the Union filed a grievance contending in part the contract should be applied to the persons performing unit work, and that same day the Union requests information concerning those persons and their working conditions, the relevance should have been obvious; the information was relevant to process the grievance. Moreover, contrary to Respondent's description of the Union's response to Respondent's January 19 letter, as described above the Union specifically explained the relevance of the information.

Finally, although I have dismissed the allegations of the complaint concerning Respondent's assignment of unit work to nonunit workers, I have described above the narrow basis of that allegation. I note that the contentions made by the Union in its grievance are different from the allegations in the complaint.

By failing to provide the Union with the information it requested concerning nonbargaining unit persons performing bargaining work, Respondent violated Section 8(a)(5) and (1) of the Act.

E. Call In Allegations

Full-time coach operators drive a set route each day of their work week. Full-time extra board coach operators work within a band of times on routes that may vary from day to day. When necessary, employees were required to work overtime on their days off.

On November 23, 1999, Respondent and the Union entered into a grievance settlement that set forth the conditions under which employees were required to work overtime. It covered matters such as a four-hour pay guarantee and circumstances under which employees would not be disciplined if they failed to work overtime. It provided that full-time extra board operators who are not scheduled to work will be notified of the overtime at the end of their last scheduled consecutive day of the employee's work week. Full-time coach operators who worked overtime on their days off would be notified by a list to be posted at the scheduling office by 4 p.m. on the preceding day. If the preceding day is a regularly scheduled day off, the employee would be notified at the end of his/her last shift when possible. Pursuant to this settlement Respondent notified employees of forced overtime by daily postings that occurred for the next day's work. Problems occurred when employees were off for several consecutive days. For example, an employee might work Monday through Thursday, ten hours per day, and be off Friday, Saturday, and Sunday. When the employee completed work on Thursday the work schedule for Friday was posted but the schedules for Saturday and Sunday would not yet be posted. Under those circumstances the employee had to either visit the facility or call in to learn if he or she had to work the next day. Otherwise, if the employee were required to overtime and did not appear the employee would be a "no call/no show" and subject to discipline.

On September 2 Respondent posted a memorandum to all operators advising them of the development and implementation of "prospective force lists." These lists would have the names of operators who might be forced to work overtime on their regularly scheduled days off. These lists would be posted daily and would cover the next three successive days. It is important to note that these lists did not eliminate the need to call in to see if an operator was actually forced to work overtime; instead it reduced the number of operators who had to do so.[4]

On December 17 Respondent posted a memorandum addressed to fixed route coach operators concerning the subject of "forced overtime." It stated "Due to the lack of manpower, we ask that you make sure that you call dispatch both Tompkins and Simmons yard on all of your days off for possible assignment. Forced overtime can happen on any of your days off, until we work through this crisis." That same day the Union filed a grievance over the December 17 posting. The grievance contended that the posting implied "at least, that all drivers are required to call both yards for possible assignment on every day they have off. There is nothing in our Collective Bargaining Agreement that imposes upon an Employee the obligation to call the Company on his or her day off for possible assignment."

Leonard Sharp has worked as a fixed route coach operator for Respondent since June 2003. During around April 2005 his days off were Saturday, Sunday, and Monday. On April 7 he was directed to see J-nean-e Mills, a senior supervisor. Mills informed Sharp that he had received two no call/no shows for not coming to work on two Sundays. Mills also told him

[4] The memorandum states that the potential force lists procedure was made in agreement and cooperation with the Union. Valero admits that Respondent advised him of the procedure before it was implemented but denies he agreed to it. Because the complaint does not allege that the implementation of the force list procedure was unlawful I need not resolve this factual dispute.

that he was being placed on a "condition of employment;" that meant Sharp would be terminated if committed any more infractions within the next six months.

Analysis

The General Counsel alleges in the complaint that Respondent violated the Act because December 17 memorandum changed working conditions in two respects. First, it required employees to call in to see if they were required to work overtime. Second, it required employees to call both yards. It is again important to note that the complaint alleges that these changes could be made only with the *consent* of the Union. In support of this theory the General Counsel does not point to any provision in the contract that was breached; rather, the General Counsel relies on the November 23, 1999, grievance settlement. *United Postal Service,* 332 NLRB 340 (2000).

Turning to that grievance settlement, the General Counsel writes in his brief that the grievance settlement described above "obligates Respondent to call employees for forced overtime work. (Tr. 64 and 65-Kellogg)." That statement is correct, but only in a misleading way. The grievance settlement and Kellogg's testimony both point out that Respondent calls *part-time extra board drivers* at home; these employees do not have fixed routes. The December 17 memo posted by Respondent and alleged as unlawful is addressed only to *fixed route coach operators.* Neither the grievance settlement nor Kellogg's testimony indicates that Respondent is required to call these employees at home to work forced overtime. Rather, the evidence shows that the coach operators subject to forced overtime have had to find out for themselves whether they are scheduled to work that overtime on their days off. Of course, I do not decide whether the December 17 memorandum changed working conditions when compared to the September 2 memorandum concerning forced overtime because that matter was not alleged to be a violation and the matter was not fully litigated.

It is important to note that employees are not disciplined if they fail to call in to find out if they are scheduled to work overtime. So long as they continue to find out on their own about their overtime schedules they are not disciplined if they either work the overtime or have a good reason to be excused from doing so. The practice that developed under the November 23, 1999 grievance settlement remained unchanged. Finally, in his brief the General Counsel does not explain what contractual obligations were breached by any requirement that employees call both yards. Because the General Counsel had failed to show that the December 17 memorandum made any changes of the type that needed the consent of the Union, I shall dismiss this allegation of the complaint.

F. Related Request for Information Allegation

On February 28 the Union sent Respondent an information request "on all operators who have been forced to work overtime." The Union requested the names of all operators who were assigned forced overtime from January 1, 2004. It requested the employee number, seniority number and each date the employee was assigned the forced overtime. The Union also asked for each date the employee was assigned the forced overtime but did not work it, whether the operator was excused from working the forced overtime, whether the operator was required to call in to learn of the overtime assignment, whether the operator received an attendance infraction for not working the forced overtime and the nature of the infraction, and other related information. Respondent did not supply the information.

Analysis

The requested information is patently relevant as it relates to the terms and conditions of employment of the unit employees. Moreover, the requirement of forced overtime was a real concern to unit employees at the time the Union made the request and the December 17 memo was followed by a grievance filed by the Union. The fact that I have dismissed the narrowly drawn allegations in the complaint does not negate the relevance of the requested information. The Union was still entitled to attempt to get the scope of the problem to either support the grievance or to inform the position it would take with Respondent in the ongoing discussions of the issue.

Respondent contends that the Union requested the information merely to harass it. There is no evidence to support this contention and I reject it. Respondent contends the Union waived its right to the information in the November 23, 1999, grievance settlement. But it does not point to any provision in that settlement agreement that either covers information requests or clearly and unmistakably waives the Union's right to this information.

By failing to provide the Union with the information it requested concerning forced overtime work, Respondent violated Section 8(a)(5) and (1) of the Act.

G. Threat and Interrogation Allegations

On December 24 Kellogg sent a memorandum to all bargaining unit employees and the Union. It began:

> Recently there have been rumors of a slow-down, sick-out and/or "blue flu" possibly planned to take place in the next few weeks. Pleased be advised that such an action by an employees or group of employees is against the law and in violation of the Collective Bargaining Agreement (CBA).

The letter quoted Section 9 of the contract. That section provides that the Union and its members will not engage in "any job actions including but not limited to picketing, strikes, walkouts, slowdowns, stoppages, sick outs or similar cessation of work …." That section also provides that the Respondent has the right to discipline "any employee who is found to be responsible for, participates in or gives leadership to any activity herein prohibited." The December 24 memorandum advised employees that Respondent reserved its right to discipline employees in the event that there was activity that was prohibited by Section 9.

On December 28 Kellogg called Valero and asked to meet with the Union's executive board. Valero was able to locate Vukdelich and Koren Johnson and the three of them went to Simmons yard where Kellogg's office is located. Kellogg came out of his office accompanied by a number of supervisors. Kellogg told the Union officials to follow the supervisors; that the three would be sent into separate rooms to answer questions. Valero protested that they were there to meet with Kellogg and would not be placed in separate rooms; that they were there as union officers and were not on the clock. A supervisor asked whether they were refusing to cooperate with the investigation and Vukdelich answered yes, and that he had a tape recorder and was going to tape the conversation. Another supervisor stated that he objected to the recording and told Vukdelich to put away the recorder. Valero replied that they were not going to be subjected to those tactics and they started to walk away. A supervisor then said that they were all under investigative suspension for failing to cooperate, that they are not to report to work, and that they had to leave the property all the while angrily shaking his finger at them. After the union officials walked out the door Kellogg approached them; after some discussions they agreed to

answer the questions but would be placed on the clock and would not be separated. The Union officials returned to the office where they sat around a table and answered the questionnaire. While they were doing so Kellogg apologized for the investigative suspensions and withdrew them.

The questionnaire that the Union officials completed was preceded by a memorandum. The subject of the memo was "investigation" and read:

> Please be advised we have reason to believe that you may be participating in or assisting in an effort to engage in an unlawful work stoppage planned to occur over the next few weeks. Accordingly, this is your opportunity to "tell me your side of the story" in this regard. Such a statement, should consist of any and all facts, names, persons participating, arrangements, contacts, dates, plans, efforts, or any and all information you have regarding a planned work stoppage, job action, sick out, flu out or any similar type of activity in violation of the collective bargaining agreement.

The memo explained that Respondent reserved its right to discipline employees for violations of Section 9 of the contract and quoted those portions of the contract. The questionnaire that accompanied the memo asked the following five questions:

> During the past 30 days, what communications have you had with ATC employees concerning a work slow down/work stoppage?
>
> What communications have you had with ATU officials from other ATU locals concerning the use of employees from other properties at the ATC location?
>
> What communications have you had with elected officials concerning a work stoppage/work slowdown?
>
> Specifically, what communications during the past 30 days have you had with Las Vegas Mayor Oscar Goodman?
>
> What communications during the past 30 days have you had with any representative of the Regional Transportation Commission concerning a work stoppage/work slow down?

All the executive board members answered that they had no conversations or involvement with any work stoppage.

Analysis

Interrogations of employees concerning their union activities are not unlawful per se; rather all relevant circumstances must be considered to determine whether or not the questioning is coercive. *Rossmore House,* 269 NLRB 1176 (1984) aff'd sub nom. *Hotel Employees Union, Local 11 v. NLRB,* 760 F. 2d 1006 (9th Cir. 1985). Here, the questioning was performed at the insistence of a high ranking official accompanied by a number of other supervisors marshaled to assist in the matter. It occurred in or near the high ranking official's office as opposed to in the employees' work area. It was accompanied by a threat of discipline and then the imposition for discipline, albeit only briefly. There is little doubt that under all the circumstances the questioning was coercive.

Respondent defends its conduct on the basis that, as indicated above, the contract forbids employees from engaging in a work stoppage or slowdown and it was reasonably attempting to ascertain if such conduct was about to occur. This argument fails for at least two reasons. First, Respondent has failed to show that it had a reasonable basis for singling out the union hierarchy for such interrogations. Although the events surrounding Thanksgiving Day gave cause for suspicion that the call outs could have been coordinated, there was no evidence linking those events to the leadership of the Union. Nor did Respondent present any evidence to connect the Union leadership with any fears of future slowdowns. Second, the questioning went beyond questions concerning an anticipated slowdown. Specifically, questions two and four were not so limited.

I conclude that by coercively interrogating employees concerning their union activities Respondent violated Section 8(a)(1). It follows that by threatening to discipline employees if they did not answer questions concerning their union activity Respondent also violated Section 8(a)(1).

H. Bid Routes and Bidding Process Allegations

As provided in the collective-bargaining agreement, Respondent creates bid packets that employees periodically select by seniority. John Collins, a full-time coach operator, has been employed by Respondent since 1992. He operated the same route off and on for about seven to eight years; he had selected that route through the contractual bidding process. On December 24 he was told he would not operate that route; he was not given a reason why he would no longer do so. On his next regular work day he resumed operating his regular route. When Stanley Homme, also a coach operator, returned from vacation on January 3 Respondent's dispatcher advised him that the route he had earlier selected through the contractual bidding process and had operated for months had been cancelled. Homme heard rumors that RTC was thinking of canceling the route due to low rider ship. For several weeks Homme was placed on "show" status where he was required to report to work each day at his regular starting time and wait for work to be assigned to him. Some days no work was available so he sat around or did miscellaneous small chores. Routes were rebid in February at which time Homme selected another route and his "show" status ended.

Vukdelich admitted that Respondent advised the Union that these route changes were made by the RTC. In the case of Collins' situation RTC gave the route for a few days to a direct competitor of Respondent. In fact, on January 10 Valero and Vukdelich met with the chairman and the general manager of the RTC who confirmed that the RTC had implemented cutbacks for Respondent's routes. Respondent did not offer to bargain with the Union concerning the routes RTC had taken away from Respondent or had eliminated. Over the years RTC had decided to add, alter, and eliminate routes and the Union has never requested to bargain with Respondent over those matters. Historically drivers adversely affected by these changes would then be placed on "show" status and continue to work their regular hours by performing whatever unit work became available until they were able to successfully bid on another regular route.

Analysis

The complaint originally had two separate allegations related to the bidding process. Paragraph 8(d) of the complaint alleged that Respondent eliminated certain bid routes for employees in the unit on about December 20. In his brief the General Counsel seeks permission to withdraw that allegation. Permission is granted and that allegation is withdrawn from the complaint. The remaining allegation, in paragraph 8(e) of the complaint, is that on or

about December 20 Respondent "failed to follow the bidding process of the Agreement" without first getting the Union's consent. In his brief the General Counsel argues that Respondent failed to follow the contractual bidding process by placing Homme and Collins on "show" status after their runs were withdrawn by the RTC. But the General Counsel has already conceded that elimination of the runs did not violate the Act and there is nothing in the contract that deals with how Respondent must treat coach operators whose runs are canceled or altered by the RTC. I dismiss this allegation of the complaint.

I. Related Refusal to Provide Information Allegation

On February 1 the Union by letter asked Respondent to provide it with information concerning employees "who have [ceased] performing their bid in works since December 1, 2004." In the letter the Union asserted that a number of bargaining unit employees had complained that they had been transferred off of their bid selection in violation of the contract. The letter stated that information was needed "to evaluated these allegations in the context of possible violations" of the collective-bargaining agreement." The letter then listed 11 specific items of information for employees who "have ceased performing the work which they bid on in their last bid." The items included the name of the employee, the employee's last run number, the date the employee last performed that work, the name and seniority of the person who has performed the work of the employee, the reason the employee was removed from the route, and other related information.

Respondent never provided this information to the Union.

Analysis

The information requested by the Union is relevant for the Union to determine whether Respondent has violated the contract. The fact that I have decided above that Respondent has not violated the Act or the contract by placing Homme and Collins on "show" status is beside the point because the Union is entitled to decide for itself, in the first instance, whether it believes the contract has been violated and it is entitled to the requested information to make that determination.

Respondent again argues that it should be excused from providing this information because the Union made the request in order to harass Respondent, but there is no evidence to support in the record to support this contention. By refusing to provide the Union with the information it requested concerning employees who no longer worked on their bids, Respondent violated Section 8(a)(5) and (1).

J. TDAN Grievance Allegation

On August 28, 2003, TDAN filed a petition to represent Respondent's employees; that petition was dismissed by the Regional Director because the collective-bargaining agreement between Respondent and the Union barred an election at that time. On February 9 a grievance was filed with Respondent concerning then-employee Elizabeth Murray. The grievance was on a form labeled "Grievance Form Transit Drivers Association of Nevada." It described that nature of the grievance as "Abuse of scheduled days off, misuse of FMLA hours, harassment, discrimination because of affiliation with TDAN." The grievance bore the signatures of Murray and Terry Richards as the "TDAN Rep." Richards has worked for Respondent for over 10 years as a fixed coach operator. Richards recorded the grievance on the grievance log maintained by Respondent. Before filing the grievance Murray and Richards met with Barry Goldsmith, a supervisor. Murray presented her side of the grievance and Goldsmith indicated that Murray

had so many miss-outs that the discipline was warranted. Richards made a point of how she felt Respondent had treated Murray unfairly. Goldsmith said that he would look into the matter and get back to them. On March 2 Kellogg informed Murray by letter that he had been advised that Murray was contending that Respondent had failed and refused to process the grievance filed on her behalf. Kellogg indicated in the letter that Respondent had received and processed the grievance but that the grievance was denied. He also indicated that the grievance could be appealed to the next level of the grievance procedure and that "We are willing and able to advance this grievance to the next level with regard to this grievance which was filed by Terry Richards." On March 16 Richards wrote Kellogg advising him that his response denying the grievance was untimely under the collective-bargaining agreement. She requested that Murray be made whole and reinstated immediately. Kellogg replied to Murray on March 24 and advised her that he was moving the grievance to the next level and asking for her available dates to discuss the grievance. On May 31 Kellogg advised TDAN Representative Richards that Respondent was prepared to go to the next step of the grievance procedure if "TDAN and/or Elizabeth Murray either jointly or individually are willing to pay $425, half of the cost of the next step." Kellogg noted that the money must be paid to the third-party neutral in cash or cashier's check before the hearing. Typically Respondent and the Union equally shared the cost of the neutral used at this stage of the grievance procedure. Kellogg testified that Respondent did not receive a reply and nothing more has occurred concerning the grievance. Kellogg testified that there had not been an adjustment of the grievance so he felt it was unnecessary to involve the Union at that point. Richards testified that she responded by letter dated June 25, 2005. In that letter Richards protested having to deposit the $425. She ended the letter by stating:

> Because it seems that you chose [to] ignore the grievance process according to the CBA that you signed!, you leave us no choice but to go ahead and file a law suit against you and ATC/VANCOM of Nevada in federal court.

Richards testified that Respondent never replied to the letter and telephone calls she made to Kellogg were not returned.

Analysis

Citing *Crown Cork & Seal Co.,* 334 NLRB 609, 700 (2001) the General Counsel writes "By accepting and processing the TDAN grievance filed by Richards on February 9, 2005, and continuing to process the grievance through at least May 31, 2005, Respondent violated Section 8(a)(1) and (2) of the Act." But *Crown Cork 7 Seal* stands for no such proposition; indeed both the judge and the Board dismissed the entire complaint.

However, as the Union argues in its brief, it is the exclusive collective bargaining representative of the unit employees; Respondent may not deal with any other labor organization concerning the working conditions of unit employees. Here, Respondent dealt with another labor organization – TDAN – in processing a unit employee's grievance.

Respondent makes several arguments in an effort to justify its conduct. Respondent points out that the contract allows individuals to file grievances and then argues that this is a case of an individual filing a grievance. But this case involves more; here TDAN represented the employee filing the individual grievance. Respondent argues that I should draw an adverse inference from the General Counsel's failure to call grievant Murray as a witness. The adverse inference, according to Respondent, is that Murray did not intend to elicit TDAN's assistance. But Murray's subjective intent is not dispositive. As outlined above, the objective facts show that TDAN represented Murray and Respondent dealt with TDAN on the grievance. Next Respondent argues that the evidence is insufficient to show that TDAN was labor organization

at the time of the grievance. However, 16 months prior to the grievance TDAN had filed a petition to represent the employees and deal with Respondent if it won the election. As previously noted, employees participate in TDAN. It easily meets the statutory definition of a labor organization set forth in Section 2(5) of the Act. Finally, Respondent argues that its conduct here is deminimis. It cites *Vons Grocery Co.,* 320 NLRB 1203 (1995), *Webcor Packaging,* and *Stoody Co.,* 320 NLRB 18 (1995). Those cases, however, dealt with the issue of whether or not an organization was a statutory labor organization and therefore are inapposite.

By dealing with a labor organization other than the Union in processing employee grievances Respondent violated Section 8(a)(2) and (1).

Conclusions of Law

1. By coercively interrogating employees concerning their union activities and by threatening to discipline employees if they did not answer questions concerning their union activity Respondent violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By dealing with a labor organization other than the Union in processing employee grievances Respondent violated Section 8(a)(2) and (1) and Section 2(6) and (7) of the Act.

3. By failing to provide the Union with the information it requested concerning nonbargaining unit persons performing bargaining work, concerning employees who no longer worked on their bids, and concerning forced overtime work, Respondent violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has unlawfully failed to provide the Union with information that the Union requested I shall order Respondent to provide that information.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, ATC, LLC d/b/a ATC of Nevada, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Coercively interrogating employees concerning their union activities.

(b) Threatening to discipline employees if they did not answer questions concerning their union activity.

(c) Failing and refusing to provide the Union with requested information that is relevant and necessary to allow the Union to perform its duties as the collective bargaining representative of the unit employees.

(d) Dealing with a labor organization other than the Union in processing employee grievances.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the information it requested concerning nonbargaining unit persons performing bargaining work, concerning employees who no longer worked on their bids, and concerning forced overtime work.

(b) Within 14 days after service by the Region, post at its facilities in Las Vegas, Nevada copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 17, 2004.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 27, 2006

_____
William G. Kocol
Administrative Law Judge

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT threaten to discipline employees if they do not answer questions concerning their union activity.

WE WILL NOT fail and refuse to provide the AMALGAMATED TRANSIT UNION, LOCAL 1637, AFL-CIO, CLC with requested information that is relevant and necessary to allow it to perform its duties as the collective bargaining representative of the unit employees.

WE WILL NOT deal with a labor organization other than the AMALGAMATED TRANSIT UNION, LOCAL 1637, AFL-CIO, CLC in processing employee grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with the information it requested concerning nonbargaining unit persons performing bargaining work, concerning employees who no longer worked on their bids, and concerning forced overtime work.

ATC, LLC d/b/a ATC OF NEVADA

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUSTNOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THISNOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146